SUPPORTING BRIEF AND ARGUMENT.

Citation of Opinion. The opinion of the Circuit Court of Appeals (R. 141) had not been reported in the Federal Reporter up to March 16, 1942.

Statement. A statement of the case has been included in the Petition for Certiorari contained herein.

Specification of Reasons for Allowance of Writ. The same reasons relied on for the allowance of the writ as are contained in the petition for certiorari are urged in this Supporting Brief.

Jurisdictional Statement. A statement of the grounds on which the jurisdiction of the Supreme Court is invoked is contained in the Petition for Certiorari.

ARGUMENT.

Preliminary. Petitioner emphasizes that it has not contended during this proceeding or at any other time that it is "*exempt*" from the unfair trade practices enumerated in paragraph 12 of Section 4 II (i). Petitioner concedes that it, on equality with all others, including farmers cooperative associations, should be and is legally obligated not to commit any of the unfair trade practices which are within the spirit and meaning of those enumerated in paragraph 12 of Section 4 II (i). If petitioner should be authorized to handle coal as a "distributor" or as an "intervening agency," without the arbitrary and unreasonable restrictions included in the order, it concedes that it would not only be amenable to regulation with reference to the prohibitions included in paragraph 12 of Section 4 II (i), but it would also be amenable to all other provisions of the Act and the regulations of the Bituminous Coal Division on the same or equal terms as all other persons and registrants.

Petitioner's primary contention is that patronage savings, because of the inherent nature thereof, are not within the meaning or intent of the prohibitions specified in paragraph 12 of Section 4 II (i), or of any other provisions of the coal Act pertaining to unlawful practices. Petitioner's secondary contention is that determining and refunding in actual cash, or allocating the patronage savings to loan capital, at the end of the fiscal year, do not constitute "practices" which are "in and directly affecting interstate commerce in bituminous coal."

These are the questions which petitioner requests the Supreme Court to decide. The court below did not discuss the question of whether or not patronage savings are by nature the legal equivalent of rebates and the other unfair methods of competition enumerated in paragraph 12 of Section 4 II (i). It assumed that patronage savings and rebates and the other unfair competitive practices are, as a matter of law, alike. It is, therefore, respectfully requested that the Supreme Court shall grant certiorari to determine whether patronage savings and rebates and the other unfair methods of competition enumerated in paragraph 12 of Section 4 II (i) are identical things, as a matter of law.

Moreover, it seems not inappropriate within this petition for certiorari to suggest to the Supreme Court the far reaching effect of the order and opinion of the court below. Inasmuch as the order would prohibit petitioner from engaging in the bituminous coal business with its constituent retail member associations which are consumers cooperative associations, as distinguished from so-called farmers associations, on equal terms with registered "distributors," who could accept and retain the discount per ton which "producers" may allow, it is obvious that petitioner would be forced to quit handling coal for its constituent retail member associations. It could not compete with "distributors" who would go into the markets with an advantage over petitioner equal to the amount of the discount per ton. It would not be satis-

factory for it to offer its services to only a part of its retail member associations. However, as hereinbefore stated, the order is self-destructive because of paragraph (b). It would have accomplished a purpose more consistently in harmony with the general view of the Division if paragraph (b) had been left out.

It logically follows, therefore, that if similar regulations should be enacted or promulgated (and similarly construed) by federal agencies on petroleum products, steel products, food products, and numerous other items of consumers goods, large wholesale cooperative associations like petitioner may be destroyed. Their constituent associations, whether dominated by farmers or other occupational groups, would suffer a severe set-back in aims and purposes, if not fail in business. The Congress never intended such legally impending results.

Legal Nature of Patronage Savings. Although the court below in its opinion did not directly discuss the legal nature of patronage savings (which, obviously, are identical in legal nature in consumers cooperative associations, regardless of whether such consumers cooperative associations are dominated by farmers or other occupational groups or composed of individual members from many different occupational groups), it nevertheless held them to be of the same legal nature as rebates and the other unfair competitive practices prohibited by paragraph 12 of Section 4 II (i).

Petitioner suggests that an analogous consideration of the opinion of the court below and the one entered in the first circuit in the case of *Quality Bakers of America et al.* v. *Federal Trade Commission*, 114 F. 2d 393, discloses a conflict. The case decided by the first circuit involves a construction of the Robinson-Patman Act. Petitioners were charged with having violated Section 2-(c) of the Robinson-Patman Act declaring that,

> "It shall be unlawful for any persons engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, any thing of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to any agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The petitioners claimed themselves to be "cooperatives." The Federal Trade Commission found that they were not. The court declined to pass on the question of whether or not they were cooperatives, saying, however:

> "* * * We deem it not necessary to consider whether either or both of the organizations mentioned are cooperatives within the meaning of the statute because we hold that Section 4 does not authorize cooperative associations to engage in the practices forbidden by Section 2-(c) of the Act, nor except them from its provisions. There is nothing in the language of the statute which warrants such a conclusion or such a forced construction. The action and debates in Congress to which we have been referred so indicate."

It is suggested that the statement,

> "* * * we hold that Section 4 does not authorize cooperative associations to engage in the practice forbidden by Section 2-(c) of the Act, nor except them from its provisions"

means very much. It means clearly that Section 4 "does not authorize" an exemption from Section 2-(c). It means that Section 4 relates to matters which are not included in Section 2-(c). Therefore, according to the opinion of the first circuit, patronage savings mentioned in Section 4 are by nature different things from the enumerated un-

lawful practices mentioned in Section 2-(c). It follows then that Section 4 of the Robinson-Patman Act is not an exempting or excepting proviso.

By analogy, the unfair practices in competition prohibited by paragraph 12 of Section 4 II (i) of the Bituminous Coal Act of 1937 are not by nature the same things as patronage savings of petitioner. By similar analogy, also, paragraph 13 of Section 4 II (i) of the coal Act is not an "*exemption*" but a clarifying or interpretative provision included to prevent misunderstanding.

The present opinion is, therefore, in conflict with the opinion of the first circuit.

In *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. Ed. 1160, wherein the Bituminous Coal Act of 1935 was declared unconstitutional, the Supreme Court held that the so-called "excise tax" was in fact enacted as a penalty to compel compliance with the regulatory provisions of the Act. In so holding the Supreme Court said:

> "While the law maker is entirely free to ignore the ordinary meanings of words and make definitions of his own (citing cases) that device may not be employed so as to change *the nature of the acts or things* to which the words are applied. * * * That the 'tax' is in fact a penalty is not seriously in dispute" (Emphasis supplied).

The Carter case therefore lays down the rule that the legal nature of patronage savings should be judicially explored before it can be said that they are, as a matter of law, the same thing by nature as the rebates and other unlawful competitive practices enumerated in paragraph 12 of Section 4 II (i).

If the Supreme Court will grant certiorari it will be shown on the merits that the debates in Congress clearly support the above suggestions concerning the Robinson-Patman Act and the Bituminous Coal Act and emphasize the points of conflict between the opinion of the first circuit and the one under consideration.

Exemption or Explanatory Proviso? The court below (R. 149, 150) and the Division (R. 120) have each asserted that paragraph 13 of Section 4 II (i) grants an "*exception*" or "*exemption*" to "*bona fide* and legitimate farmers' cooperative organizations" from the prohibitions of paragraph 12 of Section 4 II (i).

It was held in *Minis* v. *United States*, 15 Pet. 423, 445, 10 L. Ed. 791, 799, that,

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

The above rule is also stated in *United States* v. *Morrow*, 266 U. S. 531, 534, 69 L. Ed. 425, 427, also in *United States* v. *Lee et al.*, (C. C. A. Okla.) 108 F. 2d 936, 940, also in *United States* v. *Mullendore*, 35 F. 2d 78, 82. The same rule is announced in 59 C. J. 1091.

Petitioner suggests that if the rule above stated concerning provisos had been correctly followed by the court below it would not have construed the latter portion of paragraph 13 of Section 4 II (i) as granting an exemption or exception to farmers cooperative associations, but merely as an interpretative provision to prevent misunderstanding. The fact that it does not include consumers cooperative associations within its mere clarifying terms is of no legal consequence. It is suggested, therefore, that the holding in question is in conflict with the cases mentioned.

It has also been held that where a broad construction of a proviso to an act makes the proviso plainly repugnant to the body of the act, such construction will not be adopted. This rule suggests that a narrow construction of a proviso makes the proviso plainly repugnant to the body of the act, also. The narrow construction placed on paragraph 13 of Section 4 II (i) should, therefore, be re-

jected as in conflict with *Dollar Savings Bank* v. *U. S.*, 86 U. S. 227, 19 Wall. 227, 22 L. Ed. 80. The proviso contains no words specifying or implying that it was intended to be an "exemption."

It has already been stated that the first circuit in the case of *Quality Bakers of America et al.* v. *Federal Trade Commission*, 114 F. 2d 393, has directly held that cooperative associations are subject to the prohibitions enumerated in Section 2-(c) of the Robinson-Patman Act. Those prohibitions are practically the same by nature and name as the prohibitions enumerated in paragraph 12 of Section 4 II (i) of the Bituminous Coal Act of 1937. Like prohibitions have from time to time been included in numerous other federal and state statutes. Moreover, the opinion of the first circuit expressly holds that Section 4 of the Robinson-Patman Act does not exempt cooperative associations from the prohibitions of Section 2-(c) thereof. Therefore, petitioner repeats that the things prohibited in Section 2-(c) which are not exempted by Section 4 of the Robinson-Patman Act are different by nature from patronage savings mentioned in Section 4. Section 4 of the Robinson-Patman Act is therefore an interpreting or clarifying provision included merely to prevent misunderstanding. By analogy, the provision of paragraph 13 of Section 4 II (i) of the Bituminous Coal Act of 1937 relating to farmers cooperatives is not one granting an exemption or exception but merely an interpreting or clarifying provision for the purpose of preventing misunderstanding. Therefore, the holding of the court below to the effect that paragraph 13 of Section 4 II (i) of the Bituminous Coal Act of 1937 constitutes an exemption of farmers cooperatives is in conflict with the rule announced in the Quality Bakers case decided by the first circuit.

Are patronage savings matters in interstate commerce? Petitioner is convinced that its practices in determining and refunding, or allocating patronage savings to loan capital at the close of the fiscal year, are not practices

in or directly affecting interstate commerce in bituminous coal. The petitioner therefore believes the holding of the court below to the effect that the patronage savings are practices in interstate commerce is in conflict with the rule pertaining to interstate commerce announced by the Supreme Court in the case of *Schechter Poultry Corporation et al.* v. *U. S.*, 295 U. S. 495.

It is also in conflict with the rule announced in the *Apex Hosiery case*, 310 U. S. 469, 84 L. Ed. 1311, wherein the Supreme Court said that restraints on interstate commerce prohibited by the Sherman Act are only those which are so substantial as to affect *market prices.* It further said that there are no illegal restraints on interstate commerce,

> "* * * unless the restraint is shown to have or is intended to have *an effect upon prices in the market* or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition" (Emphasis supplied).

In the case of *Carter* v. *Carter*, 298 U. S. 238, 317, 80 L. Ed. 1192, in discussing the question of interstate commerce of bituminous coal under the Bituminous Coal Act of 1935, the court said:

> "But Congress may not use this protective authority as a pretext for the exercise of power to regulate activities and regulations within the states which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress in its discretion could assume control of virtually all of the activities of the people to the subversion of the fundamental principle of the Constitution."

It is suggested, therefore, that the holding of the court below, that the patronage savings determined and refunded or allocated to loan capital, at the close of the fiscal year, are matters in and directly affecting interstate commerce, is in conflict with the Carter case.

Congressional Intent. In *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 84 L. Ed. 1311, the Supreme Court said:

> "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in the light of legislative history and of the particular evils at which the legislation was aimed."

The prohibitions of the Sherman Act to which the court made reference are quite similar to the prohibitions enumerated in paragraph 12 of Section 4 II (i) of the Bituminous Coal Act of 1937. It may be properly stated therefore that the prohibitions of paragraph 12 of Section 4 II (i) are not stated in terms of precision or of crystal clarity. Since the court below did not interpret the words of paragraph 12 of Section 4 II (i) in the light of its legislative history and in the light of the particular evils at which the Bituminous Coal Act of 1937 was aimed, it follows that the court below departed from the procedural rule announced in the Apex Hosiery Company case. It made no substantial effort *"to give content to the statute."* It assumed that patronage savings are within the letter of paragraph 12 of Section 4 II (i) and let it go at that.

Also, in *Stewart* v. *Kahn*, 78 U. S. 493, 11 Wall. 493, 20 L. Ed. 176, the court stated:

> "In construing a statute the court *must consider the evils which existed*, the remedy prescribed, the object to be accomplished, and the considerations by which the lawmakers were governed" (Emphasis supplied).

It is within the power of courts to declare that a thing which is within the letter of a statute is not governed by the statute, because not within its spirit or the

intention of its makers. *Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 36 L. Ed. 226.

In *United States of America, I. C. C. et al.* v. *American Trucking Association, Inc., et al.*, 310 U. S. 534, l. c. 542, 84 L. Ed. 1345, the court said:

> "In the interpretation of statutes the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of the statute, particularly in a law to meet many needs of a major occupation. * * * When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the Act."

Finally, in *U. S.* v. *Cooper Corporation et al.*, 312 U. S. 600, 85 L. Ed. 1071, in settling the question whether the United States is "any person" who may sue for treble damages under the Sherman Act, the Supreme Court recently said:

> "Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction.
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> "2. The connotation of a term in one portion of an Act may often be clarified by reference to its use in others."

Petitioner is convinced that the opinion of the court below is in conflict with the foregoing opinions of the Supreme Court upon the question of the intent of the

Congress, when considered from the viewpoint of the body of evils that the Act was intended to cure. These evils were so widespread and disturbing to the morals, peace and safety of the nation as to evoke from the voice of former Justice Cardozo in the *Carter case, supra*, the bitter indictment that "free competition had been degraded into anarchy" in the bituminous coal industry. Speaking in words of equal terse realism, the Supreme Court in the Sunshine case (310 U. S. 381) more recently, said: "The history of the bituminous coal industry is written in blood as well as in ink."

Surely, the Congress did not intend to bring the democratic practices of cooperative associations, which seem destined to produce economic and social benefits of immeasurable value, within the category of the vile evils which the Supreme Court would soon afterwards so justly condemn.

In Conclusion, it is therefore requested that the Supreme Court, for the reasons herein set forth, will grant its writ of certiorari in furtherance of justice in this cause.

Respectfully submitted,

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